Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM 1977

NO. 77-760

Robert Levine And
Charlotte Levine, *Petitioners*

V.

Robert M. Stein, Joanne Stein, Edward S. Stein,
Arthur H. Stein, Barbara S. Feldman, Iula V. Lichtenberg,
Trustee Joseph Gould, Substitute Trustee and Lewis K. Kesser,
Respondents

PETITION IN OPPITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1977

No.

ROBERT LEVINE and
CHARLOTTE LEVINE,

Petitioners,

v.

ROBERT M. STEIN,
JOANNE STEIN,
EDWARD S. STEIN,
ARTHUR H. STEIN,
BARBARA S. FELDMAN,
IULA V. LICHTENBERG, Trustee,
JOSEPH GOULD, Substitute Trustee
and
LEWIS K. KESSER,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

Now come the Respondents, Robert M. Stein, Joanne Stein, Edward S. Stein,

Arthur H. Stein, Barbara S. Feldman, Iula V. Lichtenberg, Trustee, and Joseph Gould, Substitute Trustee, by counsel, and in opposition to the Petition for Certiorari filed herein state unto this Honorable Court as follows:

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is reported in 560 F.2d 1175 (4th Cir. 1977) (Petition, pages 14-19).

JURISDICTION

The jurisdictional requisites are set forth in the Petition at page 2.

QUESTIONS PRESENTED

1. Did the District Court err in dismissing the Complaint herein because of lack of jurisdiction and after Appellants had failed to raise this constitution challenge in three previous appeals to the Virginia Supreme Court.

STATUTES INVOLVED

The pertinent federal and state statutes are set forth in the Petition at pages 3-7.

STATEMENT OF THE CASE AND FACTS

This litigation arises from the foreclosure under deeds of trust of three pieces of real estate in the City of Norfolk, Virginia, known as the NARO Theater Property, Frazier Pharmacy Property, and the Cougar Lounge Property.

There were three deeds of trust, dated March 20, 1974, on three parcels of property securing three notes for $15,000.00, $35,000.00 and $60,000.00, a total of $110,000.00. These deeds of trust were properly recorded in the Clerk's Office of the Circuit Court of the City of Norfolk, the Respondents Stein and Feldman being the noteholders secured thereby.

At appropriate foreclosure sales, conducted in accordance with the terms of the deeds of trust, in February and March, 1975, the NARO Theater and Frazier Pharmacy properties were bought in by the noteholders. Respondent Lewis K. Kesser was the purchaser of the Cougar Lounge realty at its foreclosure sale, properly conducted by the Trustee in August, 1975.

The Steins instituted suit in the Circuit Court of the City of Norfolk for possession of the NARO Theater property purchased by them at the foreclosure sale and were awarded such possession by judgment of that Court on July 10, 1975. The Court in separate actions instituted by Petitioners also determined that the foreclosure sales were legal under Virginia law.

A separate law action was also filed in the Circuit Court of the City

of Norfolk seeking a deficiency judgment for the balance due on the notes after the application of the foreclosure sales proceeds, and a judgment was entered in favor of the Respondents Stein and Feldman in that action.

The Petitioners thereafter appealed to the Virginia Supreme Court the final decrees which had declared the foreclosure sales to be in accordance with Virginia law. Such petitions were denied by the Supreme Court. The decrees of the Circuit Court of the City of Norfolk granting possession of the NARO Theater and Frazier Pharmacy properties have likewise been appealed by the Petitioners and denied. Pending before the Virginia Supreme Court at the time of the District Court proceeding were the deficiency judgment orders entered by the Circuit Court of the City of Norfolk on April 29, 1976, and the

decree of the Circuit Court affirming the legality of the sale of the Cougar Lounge property to Kesser. Both of these petitions for appeal have subsequently been denied, all five suits being thereby disposed of in Respondents' favor by the Virginia Supreme Court.

The Petitioners then filed suit in the United States District Court seeking to have the three foreclosure sales, already declared to be legal and valid by the Circuit Court of the City of Norfolk and affirmed in two (now three) instances by the Virginia Supreme Court, declared illegal under the Fourteenth Amendment of the Constitution of the United States on the ground that Sections 55-59 et seq., 26-15, and 26-16 of the Code of Virginia are unconstitutional, jurisdiction being asserted under 28 U.S.C. §1331 (a).

Sections 26-15 and 26-16 of the

Virginia Code provide that subsequent to a foreclosure sale conducted pursuant to the terms of a deed of trust, the trustee thereunder shall file, within four (4) months, with a commissioner of accounts a sale accounting, which the commissioner audits and reports to the court where it is in turn recorded by the clerk thereof.

This procedure has absolutely no effect upon the validity of the sale and is not a prerequisite to the recordation of the foreclosure deed. Failure to comply with these provisions subjects the trustee to potential forfeiture of his commission and contempt proceedings if reports are not submitted within such time as the court may order. Thus, any defalcations in this respect by the trustee are chargeable solely to him and have no bearing upon the prior foreclosure proceedings.

Virginia Code Section 55-59 merely standardizes the rights and obligations conferred and imposed under deeds of trust unless provisions to the contrary are contained therein. Subparagraph (6) of Section 55-59 also requires, in addition to newspaper advertisement of a sale upon default, that the trustee or secured party provide the owner of the property with written notice of the proposed sale either by personal delivery or certified or registered mail, which notice must be posted at least fourteen (14) days prior to the sale date. There is no contention that Respondents did not comply with the notice and other statutory requirements.

Virginia Code Section 55-60 sets forth certain terms with definitions, which terms may be utilized in deeds of trust in lieu of lengthy recitations of legal clauses and serve to reduce the

complexity of such documents and standardize their contents.

The other Virginia enactments dealing with deeds of trust are generally remedial in nature, construing certain advertising requirements (Section 55-63) and instruments with no maturity date or power of sale (Section 55-61), providing a permissible notice of sale form (Section 55-62), validating certain previous sales (Sections 55-65, 55-65.1, 55-66) and establishing a marginal release system (Section 55-66.3).

THE LAW AND THE ARGUMENT

THE VIRGINIA STATUTES RELATING TO DEEDS OF TRUST AND FORECLOSURE THEREUNDER DO NOT CONSTITUTE SUCH "SIGNIFICANT STATE INVOLVEMENT" AS TO INVOKE THE FOURTEENTH AMENDMENT GUARANTEES AND THE JURISDICTION OF FEDERAL COURTS.

The Complaint filed herein clearly indicates in Paragraphs 4 and 7 thereof that the substance of this action has been litigated in at least five proceed-

ings in the Circuit Court of the City of Norfolk. Of these five, all have been appealed to the Supreme Court of Virginia, and all five appeals have now been denied. It is, therefore, obvious that if the Petitioners desired to challenge the constitutionality of the Virginia foreclosure statute complained of herein, ample opportunity was afforded in these suits. Having chosen to forego the litigation of this issue in the prior state proceedings, they are barred from now resorting to the federal courts for relief.

The United States Supreme Court has long held that a final judgment by a court of competent jurisdiction is res judicata as to the parties thereto, not only as to all matters litigated and determined by such judgment, but also as to all relevant issues which could have been presented. Angel v. Bullington,

330 U.S. 183, 192-93 (1947); Fishgold v. Sullivan Dry Dock & Repair Corp., 328 U.S. 275, 282-83 (1946); Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 378 (1940); Grubb v. Public Utilities Commissions, 281 U.S. 470, 479 (1930); Cromwell v. County of Sac, 94 U.S. 351, 352 (1877). See also 1 B Moore's Federal Practice ¶0.405 [3] (Supp. 1975).

Similarly, it has been held that it is immaterial whether or not constitutional issues were actually litigated in a state court action as "a final judgment on the merits between parties who in law are the same operates as a bar to subsequent action upon the same cause of action, settling not only every issue that was raised, but also every issue that might have been raised in the first action." Flynn v. State Bd. of Chiropractic Examiners, 418 F. 2d 668 (9th

Cir. 1969).

Although leaning toward the view that the prior proceedings were a bar to this litigation and that the Petitioners were ". . . doing nothing here but seeking to use this District Court as an Appellate Court for the Virginia Supreme Court on issues between the same parties . . . ", the lower court, in its Memorandum Order of July 30, 1976, denied the motion to dismiss on the theory of res judicata and indicated its conclusion that lack of jurisdiction was the issue upon which briefs and argument were desired. Objection and exception to this Order were duly noted by Respondents in a letter to the Court on August 4, 1976, with copy to opposing counsel. The Fourth Circuit Court of Appeals did not consider this issue in light of its conclusion as to the lack of jurisdiction.

It is axiomatic that the due-

process shelter of the Fourteenth Amendment encompasses only governmental deprivations of life, liberty or property and adds nothing to the rights of one citizen against another. United States v. Cruikshank, 92 U.S. 542 (1875). The Fourteenth Amendment " . . . erects no shield against merely private conduct, however discriminatory or wrongful." Shelley v. Kraemer, 334 U.S. 1, 13 (1948).

To invoke the protection of Fourteenth Amendment due process, some "significant government involvement" must be established in connection with the challenged action. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 173 (1972); Reitman v. Mulkey, 387 U.S. 369, 380 (1967).

Prior to the decision of the Fourth Circuit Court of Appeals in this litigation, three federal circuit courts of

appeals had considered constitutional challenges to deed of trust foreclosure procedures upon the claim that such sales, without provision for prior judicial hearings, are deprivations of property without due process and that state statutes recognizing such procedures bring them within the ambit of the Fourteenth Amendment. Of these decisions, all have rejected such contentions, discerning no "significant state involvement." Northrip v. Federal National Mortgage Association, 527 F.2d 23 (6th Cir. 1974), rev'g. 372 F. Supp. 594 (E.D. Mich. 1974); Barrera v. Security Bldg. & Investment Corp., 519 F.2d 1166 (5th Cir. 1975); Bryant v. Jefferson Fed. Sav. & Loan Association, 509 F.2d 511 (D.C. Cir. 1974).

The decision of the Fourth Circuit in this matter did nothing more than to continue this unanimous trend.

The same conclusion was reached in Kenly v. Miracle Properties, 412 F. Supp. 1072 (D. Arix. 1976); Lawson v. Smith, 402 F. Supp. 851 (N.D. Calif. 1975); Leisure Estates of America v. Carmel Development Co., 371 F. Supp. 556 (S.D. Tex. 1974); Hoffman v. H.U.D., 371 F. Supp. 576 (N.D. Tex. 1974); Law v. United States Dept. of Agriculture, 366 F. Supp. 1233 (N.D. Ga. 1973); and by the Supreme Courts of California, Georgia and Missouri. U.S. Hertz, Inc. v. Niobrara Farms, 41 Cal. App. 3d 68, 116 Cal. Rptr. 44 (1974); Coffey Enter. Realty & Devel. Co. v. Holmes, 233 Ga. 937, 213 S.E. 2d 882 (1975); Federal Nat'l Mortgage Ass'n v. Howlett, 521 S.W. 2d 428 (Mo. 1975).

Review of the cases in which challenges to statutes like those in point are considered reveals basically four theories upon which significant state

action is alleged:

(1) the entanglement theory -- challenged actions are so intertwined with governmental policies as to constitute governmental action;

(2) the encouragement theory -- statutes encourage use of the deed of trust;

(3) delegation of public function theory -- foreclosing creditors perform a traditionally governmental function;

(4) direct governmental involvement theory -- participation by state officials in the sale and/or recording procedures constitutes direct governmental action.

In weighing the merits of these asserted indicia of state action, it should be initially noted that the deed of trust as a security instrument with its characteristic power of private sale is of common-law origin and its use in this country dates at least as far back

as 1774. Barrera v. Security Bldg. & Investment Corp., 519 F.2d 1166, 1172 (5th Cir. 1975). The device has been judicially recognized by the United States Supreme Court Bell Silver & Copper Mining Co. v. First National Bank, 156 U.S. 470, 477 (1895), this Court subsequently noting that "[t]he validity of such a contractual power of sale is unquestionable." Scott v. Paisley, 271 U.S. 632, 635 (1926).

The deed of trust is a private contractual arrangement for securement of a debt with the grantor vesting the trustee with a private power of sale upon default, its creation and enforcement being of purely private rather than governmental origin. Bryant v. Jefferson Fed. Sav. & Loan Ass'n., 509 F.2d 511, 513 (D.C. Cir. 1974). "The fact is that the power of sale exercised by the trustee was not derived from the statute

nor granted by the state. It is a contractural right established by the power of sale provision in the deed of trust." Federal Nat'l. Mortgage Ass'n. v. Howlett, 521 S.W.2d at 432.

Thus, there is no entanglement with governmental policies. Enactment of merely regulatory laws cannot thereby bring all private transactions within the accepted definitions of "state action."

> Statutes and laws regulate many forms of purely private activity, such as contractual relations and gifts, and subjecting all behavior that conforms to state law to the Fourteenth Amendment would emasculate the state action concept. Bryant v. Jefferson Fed. Sav. & Loan Ass'n., 509 F.2d at 514, citing Adams v. Southern California First National Bank, 492 F.2d 324, 330-31 (9th Cir. 1973), cert. denied, 419 U.S. 1006 (1974).

Nor can statutes, like the Virginia notice and advertisement requirements,

be said to encourage utilization of the deed of trust format. Bryant v. Jefferson Fed. Sav. & Loan Ass'n., 509 F.2d at 514. Rather, such restrictions serve to curb abuses sometimes associated with private sales. Northrip v. Federal National Mortgage Association, 527 F.2d at 27; Barrera v. Security Bldg. & Investment Corp., 519 F.2d at 1171. If anything, such statutes reduce the attraction of the common law deed of trust form through increasing the time and costs of compliance with the statutory requisites.

Such enactments do not unlawfully delegate a public function inasmuch as the private sale power is not a creature of the legislature but has long been an element of the common law. Northrip v. Federal National Mortgage Association, 527 F.2d at 29; Bryant v. Jefferson Fed. Sav. & Loan Association, 509 F.2d at

515.

Lastly, participation by a state official in a ministerial capacity in the sale and/or recordation of the foreclosure deed does not constitute direct state action. Lawson v. Smith, 402 F. Supp. 851, 855 (N.D. Cal. 1975). Nor does state involvement exist merely because the state recognizes the legal effect of private arrangements. Barrera v. Security Bldg. & Investment Corp., 519 F.2d at 1170; Northrip v. Federal National Mortgage Ass'n., 527 F.2d at 28; see also Black v. Cutter Laboratories, 351 U.S. 292 (1956).

The foregoing theories of potential state involvement have also been advanced in analogous challenges to the traditional remedy of self-help repossession of chattels, now codified as Section 9-503 of the Uniform Commercial Code. These arguments have been uniformly and deci-

sively rejected in the circuit courts which have considered them with the Supreme Court denying certiorari in two of such cases. Gibbs v. Titelman, 502 F.2d 1107 (3rd Cir. 1974); Shirley v. State National Bank, 493 F.2d 739 (2d Cir. 1974); James v. Pinnix, 495 F.2d 206 (5th Cir. 1974); Nowlin v. Professional Auto Sales, Inc., 496 F.2d 16 (8th Cir.), cert. denied, 419 U.S. 1006 (1974); Adams v. Southern California First National Bank, 492 F.2d 324 (9th Cir.), cert. denied, 419 U.S. 1006 (1974).

The Petitioners commend to the Court's attention Fuentes v. Shevin, 407 U.S. 67 (1972), striking down replevin of goods through public officials without a pre-seizure hearing on the underlying claim. However, both Fuentes and the garnishment case of Sniadach v. Family Finance Corp., 395 U.S. 337 (1969),

involved seizure of property through the intervention of some direct arm of governmental authority as opposed to purely private sales conducted pursuant to a similarly private agreement. This critical distinction was noted in Northrip, 527 F.2d at 28-29; Barrera, 519 F.2d at 1170; U.S. Hertz, Inc. v. Niobrara Farms, 51 Cal. App. 3d 68, 116 Cal. Rptr. 44, 56 (1974); and Kenly v. Miracle Properties, 412 F. Supp. at 1074.

In addition, Petitioners cite Turner v. Blackburn, 389 F. Supp. 1250 (W.D.N.C. 1975), which struck down North Carolina's statutory procedure for real property mortgage foreclosures. Unlike North Carolina, the Virginia enactments entail no critical role for the clerk of the court. The Blackburn decision deemed significant as evidence of state action the clerk's role in North Carolina in verifying the trustee's report and

administering the upset bid provisions. 389 F. Supp. at 1256. Thus, in that circumstance, the filing of a valid sale report was a necessary precondition to the trustee's power to convey to the highest bidder at the auction. Only the filing of this report triggered the running of the ten-day upset bid period, the lapse of which time without intervention -- as by submission of such a bid -- empowered the trustee to consummate the sale. Furthermore, the administration of the upset bid procedure by the clerk rather than the trustee was deemed to denote state action. Id.

The Virginia statutory process is markedly different from the foregoing. In this state, there is absolutely no upset bid provision nor any discretion vested in the clerks of court whereby they exercise any control over the consummation of the foreclosure sale.

The report filed with a commissioner of accounts by the trustee and ultimately conveyed to the clerk for recordation pursuant to Virginia Code Section 26-15 and 26-16 has no effect upon the foreclosure sale. In fact, it may be lodged with the commissioner up to four months after the sale. The only sanctions for failure to render such a report lie against the trustee and affect neither directly nor indirectly the legality of the sale or the ability of the purchaser to have his deed recorded. The role of the clerk is clearly passive in this regard as with the recordation of any deed.

Thus, the state involvement perceived by the Blackburn court does not exist in Virginia where the clerk's actions are purely ministerial. See Barrera v. Security Bldg. & Investment Corp., 519 F.2d at 1170, n.5; Kenly v.

Miracle Properties, 412 F. Supp. at 1076-77.

Petitioners basic contention is that the Virginia statutes "authorize" or "create" a power of sale in the trustee. Such assertion is completely unfounded, the law simply recognizing the private, common-law contractural right vested in the trustee by the parties.

The purely ministerial marginal release procedure (§§55-66.3 and 55-66.5) cannot constitute state action any more than the recordation of a deed of bargain and sale. In this same vein, the provision of a permissible deed of trust form (§55-58) with interpretations of phrases which may be used therein (§55-60) is no more of an indication of state action than the permissible deed of bargain and sale form in Code §55-48 and the permissible lease form in Code

§55-57 with attendant interpretation of phrases and clauses used therein in Code §§55-67 through 55-79. If Petitioners' position is correct, then every deed and lease utilizing these forms and phrases involves some aspect of state involvement.

As to the validation of certain sales under deeds of trust made prior to June 19, 1934 (§55-65), between 1940 and 1944 (§55-66) and in counties contiguous to first class cities (§55-65.1), the same effort to clear records and settle land titles is reflected in Code §55-55 validating certain sales and leases by county courts.

Code §55-66.1 merely provides a means of marginally noting the assignment or transfer of a deed of trust, again nothing more than ministerially making a public record of a private transaction.

Partial releases (§55-66.4) may be noted marginally as well as complete

releases (§55-66.6), all ministerial actions by the clerk involving no discretion on his part. The fact that the clerk is authorized to collect a fee under Code §55-66.7 can involve no more state action than any other recordation or service fees which the clerk is permitted by law to assess.

By listing every deed of trust statute, Petitioners hope to prove state action by numerosity, but a reading of these statutes clearly brings them within the precedents previously cited. Counsel for the Levines attempts to dismiss the cases cited by the District Court in its opinion by summarily stating that the statutes involved did not "authorize" or "create" the power of sale as do the Virginia enactments. To the contrary, the statutes in Barrera, Northrip and Bryant, supra, recognize such power of sale and provide procedural

regulation thereof just as do the challenged laws here. For example, "Section 301 of Title 45, District of Columbia Code, authorizes the inclusion in mortgages, deeds of trust and other contracts conveying title to realty of clauses granting power to sell secured real property at public auction" (Bryant, 509 F.2d at 512), yet the District of Columbia Court of Appeals specifically held that such provision " . . . creates no power of sale . . . " but merely recognizes a power of sale " . . . created by private consensual agreement." 509 F.2d at 513.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition

for a writ of certiorari should be denied.

Respectfully submitted,

ROBERT M. STEIN,
JOANNE STEIN,
EDWARD S. STEIN,
ARTHUR H. STEIN,
BARBARA S. FELDMAN,
IULA V. LICHTENBERG,
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CERTIFICATE OF SERVICE

I hereby certify that three true copies of the foregoing Brief were mailed, postage prepaid, to Howard I. Legum, counsel for Petitioners, 720 Law Building, Norfolk, Virginia 23510 and

to Respondent Lewis K. Kesser, 109 Bankers Trust Building, Norfolk, Virginia 23510 on this the 27TH day of December, 1977, prior to the filing of same with the Clerk of the Supreme Court.

James C. Howell